Public Prosecutor v Chia Leong Foo

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO D81–33 OF 1998
AUGUSTINE PAUL J
30 AUGUST 2000

Evidence *— Adverse inference — Prosecution's failure to call witness — Accused arrested for trafficking dangerous drugs together with his pillon rider — Pillon rider not called to give evidence — Whether reasonable doubt as to guilt of accused — Whether adverse presumption against prosecution for failure to call pillon rider to give evidence*

Evidence *— Documentary evidence — Chemist's report — Report pertaining to analysis of drugs — Whether chemist must give particulars of tests carried out on samples — Criminal Procedure Code — s 399(1)*

The accused was charged with trafficking in 218.79g of heroin and monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The accused claimed trial to the charge. The facts of the case revealed that at the material time the accused was riding motorcycle bearing registration number WFU 4399 with one Yee Chin Koon as pillion rider. The motorcycle was registered in the name of the accused. When the motorcycle passed PW6, he did not see Yee Chin Koon holding anything. PW6 followed the motorcycle from behind and shouted the word 'Police' at the accused. However, the accused accelerated the speed of his motorcycle. When the accused was trying to escape, PW6 saw him taking out a white bag from the carrier of the motorcycle and throwing it away. He did not see Yee Chin Koon throwing anything. PW6 then came closer to the motorcycle. The motorcycle lost control and knocked into the road divider. The accused and Yee Chin Koon fell down. Yee Chee Koon who got up and tried to escape was chased and arrested by the police. PW6 said that he saw PW4 taking the bag which the accused had thrown. He confirmed that the bag retrieved by PW4 was the bag that the accused had thrown. The evidence of PW4 was in line with the testimony of PW6. It was found that the bag had ten plastic packets suspected to contain heroin. Upon analysis by the chemist, they were found to contain 218.79g of heroin and monoacetylmorphines. It was suggested to PW4 and PW6 in cross-examination that the white bag was held by Yee Chin Koon; that the motorcycle was knocked into from behind; that the accused wore the yellow helmet at the material time and that he did not throw the white bag. These suggestions were denied by the two witnesses.

Held, acquitting and discharging the accused:

(1) The court found PW4 and PW6 to be credible witnesses and therefore accepted their version of the sequence of events. The white bag containing the dangerous drugs was in the carrier of the

motorcycle. It was therefore clearly visible to the accused. He was the owner of the motorcycle. He was riding it at the material time. He was therefore in charge of the motorcycle. These facts led to the inference that he was in custody or control of the white bag in the carrier of the motorcycle. The further fact that it was the accused who took the bag from the carrier and threw it away coupled with the fact that he attempted to flee in such circumstances by accelerating the speed of the motorcycle when confronted by the police connected him to the offence with which he had been charged. The combined effect of the inferences was that the accused was in possession of the white bag at the material time and knew the nature of its contents. The large quantity of drugs involved, being about 14 times the amount which would suffice to raise the presumption of trafficking, showed that they were not intended for the personal consumption of the accused. As he was transporting the dangerous drugs at the material time, the prosecution had made out a prima facie case of trafficking against him (see pp 726F–G, 727A–C).

(2) The liability of the accused was not in any way affected by the presence of Yee Chin Koon with him at the time of arrest because the prosecution had made out a clear and complete case against the accused. The only evidence against Yee Chin Koon was his act of running away which, in the absence of other evidence, only showed knowledge by him of the possession of the drugs by the accused (see p 727D).

(3) As the court had found that the prosecution had made out a prima facie case against the accused, this meant that the prosecution had led sufficient evidence to unfold the narrative of its case. Thus its failure to call Yee Chin Koon as a witness or make him available to the defence was not fatal at this stage (see p 729G–H).

(4) As the evidence of the chemist on the analysis of drugs by him was not evidence of opinion but evidence of fact, he need not give particulars of the tests carried out by him in his evidence. It follows that his report, tendered in evidence under s 399(1) of the Criminal Procedure Code, also need not contain such particulars. In any event, the court was entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. Thus if the accused was dissatisfied with the conclusion reached by the chemist, it was for him to summon the chemist as a witness for that purpose or adduce evidence in rebuttal. This had not been done by the accused in this case. The chemist report tendered in evidence in this case was therefore not defective (see pp 735G–736A).

(5) The doubt created by the defence on the person who was wearing the yellow helmet and the reason why the motorcycle fell raised

doubts as to the person who actually threw the white bag. Upon a consideration of the whole of the evidence adduced, the court was satisfied that the defence had raised a reasonable doubt in the prosecution case. As proof of guilt can be established only on the whole of the evidence adduced, it emerged that Yee Chin Koon's evidence is material which the prosecution ought to have adduced. This raised the presumption under s 114(g) of the Evidence Act 1950 that if such evidence had been adduced it would have been unfavourable to the prosecution. Therefore the court was not satisfied that the prosecution had proved its case against the accused beyond reasonable doubt (see p 738A, C–D).

[Bahasa Malaysia summary

Tertuduh telah dituduh mengedar 218.79g dadah heroin dan monoacetylmorphine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum di bawah s 39B(2) Akta tersebut. Tertuduh telah menuntut perbicaraan kepada pertuduhan tersebut. Fakta-fakta kes tersebut mendedahkan bahawa pada waktu yang material, tertuduh sedang menunggang motosikal yang mempunyai nombor pendaftaran WFU 4399 dengan pembonceng bernama Yee Chin Koon. Motosikal tersebut didaftarkan atas nama tertuduh. Ketika motosikal tersebut berselisih dengan PW6, beliau tidak melihat Yee Chin Koon memegang apa-apa. PW6 telah mengikuti motosikal itu dari belakang dan menjerit perkataan 'Polis' pada tertuduh. Walau bagaimanapun, tertuduh telah melajukan kelajuan motosikalnya. Ketika tertuduh cuba melarikan diri, PW6 ternampak beliau mengeluarkan sebuah beg putih daripada tempat pembawa barangan motosikal tersebut dan mencampakkannya. Beliau tidak nampak Yee Chin Koon mencampakkan apa-apa. PW6 kemudiannya menghampiri lebih dekat lagi dengan motosikal tersebut. Motosikal tersebut terbabas lalu melanggar pembahagi jalan. Tertuduh dan Yee Chin Koon jatuh. Yee Chin Koon yang telah bangun dan cuba melarikan diri telah dikejar dan ditangkap oleh polis. PW6 mengatakan bahawa beliau nampak PW4 mengambil beg yang telah dibuang oleh tertuduh. Beliau mengesahkan bahawa beg yang dijumpai oleh PW4 adalah beg yang telah dibuang oleh tertuduh. Keterangan PW4 adalah sejajar dengan testimoni PW6. Adalah didapati bahawa beg tersebut mempunyai sepuluh paket plastik yang disyaki mengandungi heroin. Setelah dianalisakan oleh ahli kimia, adalah didapati bahawa ia mengandungi 218.79g dadah heroin dan monoacetylmorphines. Adalah disarankan kepada PW4 dan PW6 dalam pemeriksaan-balas bahawa beg putih itu telah dipegang oleh Yee Chin Koon; bahawa motosikal tersebut telah dilanggar dari belakang; bahawa tertuduh memakai topi keledar berwarna kuning pada waktu yang material itu dan bahawa beliau tidak membuang beg putih tersebut. Saranan-saranan ini dinafikan oleh kedua-dua saksi.

Diputuskan, membebaskan dan melepaskan tertuduh: A

(1) Mahkamah mendapati PW4 dan PW6 adalah saksi-saksi yang boleh dipercayai dan oleh itu telah menerima versi mereka berhubung dengan urutan peristiwa tersebut. Beg putih yang mengandungi dadah berbahaya itu telah berada dalam bahagian pembawa barangan motosikal tersebut. Ia adalah dengan itu amat B jelas kelihatan kepada tertuduh. Beliau adalah tuan punya motosikal tersebut. Pada waktu yang material, beliau sedang menunggangnya. Oleh itu, beliau sedang mengendalikan motosikal tersebut. Fakta-fakta ini membawa kepada inferens bahawa beliau mempunyai penjagaan atau kawalan beg putih dalam bahagian pembawa barangan motosikal tersebut. Fakta C selanjutnya bahawa tertuduh telah mengambil beg tersebut daripada bahagian pembawa barangan motosikal itu lalu membuangnya berserta dengan hakikat bahawa beliau telah cuba untuk melarikan diri dalam keadaan yang sedemikian dengan meningkatkan kelajuan motosikal tersebut apabila berhadapan D dengan polis mengaitkan beliau kepada kesalahan yang mana beliau telah dituduh. Kesan bergabung inferens tersebut adalah bahawa tertuduh mempunyai dalam milikannya beg putih tersebut dan mengetahui akan kandungannya. Kuantiti dadah yang banyak itu, lebih kurang 14 kali jumlah yang akan mencukupi untuk membangkitkan tanggapan pengedaran dadah, E menunjukkan bahawa ia bukan diniatkan untuk penggunaan peribadi tertuduh. Oleh kerana beliau sedang mengangkut dadah berbahaya tersebut pada waktu yang material itu, pihak pendakwaan telah membuat kes prima facie mengedar dadah terhadap beliau (lihat ms 726F–G, 727A–C).

F

(2) Tanggungan tertuduh tidak dalam apa cara pun terjejas dengan kehadiran Yee Chin Koon bersama beliau ketika waktu penangkapan kerana pihak pendakwaan telah membuat satu kes yang jelas dan lengkap terhadap tertuduh. Satu-satunya keterangan terhadap Yee Chin Koon adalah perbuatan beliau melarikan diri yang mana, dalam ketiadaan keterangan lain, G hanya menunjukkan pengetahuan beliau akan pemilikan dadah tersebut oleh tertuduh (lihat ms 727D).

(3) Oleh kerana mahkamah telah mendapati bahawa pihak pendakwaan telah membuat satu kes prima facie terhadap tertuduh, ini bermakna bahawa pihak pendakwaan telah H mengemukakan keterangan yang cukup untuk mendedahkan naratif kesnya. Oleh itu, kegagalannya untuk memanggil Yee Chin Koon sebagai seorang saksi atau mengadakan beliau kepada pihak pembelaan tidak memudaratkan di peringkat ini (lihat ms 729G–H).

(4) Oleh kerana keterangan ahli kimia mengenai analisa dadah oleh I beliau bukannya merupakan keterangan pendapat tetapi adalah keterangan fakta, beliau tidak perlu memberikan butir-butir

mengenai ujian-ujian yang dijalankan oleh beliau dalam keterangannya. Didapati bahawa laporan beliau, yang dikemukakan dalam keterangan di bawah s 399(1) Kanun Acara Jenayah, juga tidak perlu mengandungi butir-butir sedemikian. Dalam sebarang keadaan, mahkamah berhak untuk menerima keterangan ahli kimia tersebut mengikut nilainya tanpa perlu bagi beliau memberikan butir-butir langkah demi langkah mengenai apa yang telah beliau lakukan dalam makmal kecuali jika memang mustahil atau pihak pembelaan meminta keterangan pematahan oleh pakar yang lain. Oleh itu, jika tertuduh tidak berpuashati dengan kesimpulan yang dicapai oleh ahli kimia tersebut, terpulang bagi beliau untuk memanggil ahli kimia tersebut sebagai seorang saksi untuk tujuan itu atau mengemukakan keterangan pematahan. Ini tidak dilakukan oleh tertuduh tersebut dalam kes ini. Laporan ahli kimia yang dikemukakan dalam keterangan di dalam kes ini adalah dengan itu sempurna (lihat ms 735G–736A).

(5) Keraguan yang diwujudkan oleh pihak pembelaan ke atas orang yang memakai topi keledar berwarna kuning dan alasan mengapa motosikal itu jatuh membangkitkan keraguan berhubung dengan orang yang sebenarnya membuang beg putih tersebut. Setelah dipertimbangkan keseluruhan keterangan yang telah dikemukakan, mahkamah berpuashati bahawa pihak pembelaan telah membangkitkan suatu keraguan yang munasabah dalam kes pihak pendakwaan. Oleh kerana bukti bersalah hanya boleh ditentukan atas keseluruhan keterangan yang dikemukakan, didapati bahawa keterangan Yee Chin Koon adalah penting yang mana pihak pendakwaan sepatutnya telah kemukakan. Ini membangkitkan tanggapan di bawah s 114(g) Akta Keterangan 1950 bahawa jika keterangan yang sedemikian telah dikemukakan, ia tidak akan memihak kepada pihak pendakwaan. Oleh itu, mahkamah tidak berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya terhadap tertuduh tanpa keraguan yang munasabah (lihat ms 738A, C–D).]

Notes

For a case on the failure of the prosecution to call a witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 112.

For cases on chemist's report, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 718–720.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)

Abu Bakar v R [1963] MLJ 288 (refd)

Baharom v PP [1960] MLJ 249 (refd)

Bhagat Bahadur v State (1996) Cri LJ 2201 (refd)

Chan Kwok Keung & Anor v The Queen [1990] 1 CLJ 411 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Chandra Bhawan v State of Mysore (1969) II SCWR 750 (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Chua Keem Long v PP [1996] 1 SLR 510 (refd)
Cohen Lorraine Philis & Anor v PP [1989] 3 MLJ 289 (refd)
Director of Public Prosecutions v Wishart Brooks [1974] AC 862 (refd)
Goh Ah Yew v PP [1949] MLJ 150 (refd)
Haryadi bin Dadeh v Pendakwa Raya [2000] 4 MLJ 71 (refd)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190 (refd)
Kadir bin Awang v PP [1989] 2 MLJ 33 (refd)
Kewal Singh v Lajwanti AIR 1980 SC 161 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lachmandas v State of Bombay [1952] SCR 710 (refd)
Lai Yong Koon v PP [1962] MLJ 327 (refd)
Lee Lee Chong v PP [1998] 4 MLJ 697 (refd)
Leong Siew Hoong v PP [1988] 1 MLJ 396 (refd)
Liew Sai Wah v PP [1968] 2 MLJ 1 (refd)
Lim Young Sien v PP [1994] 2 SLR 257 (refd)
Ling Ngan Liong v PP [1964] MLJ 20 (refd)
Lo Fat Thjan & Ors v PP [1968] 1 MLJ 274 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Mohd Said bin Samad v PP [1998] 2 MLJ 294 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53 (refd)
Namasiyiam & Ors v PP [1987] 2 MLJ 336 (refd)
Neo Koon Cheo v R [1959] MLJ 47 (refd)
Ng Chai Kem v PP [1994] 2 MLJ 210 (refd)
Ng Kim Huat v PP [1961] MLJ 308 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)
Parmeshwar v R AIR 1941 Orissa 517 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564 (refd)
PP v Cheng Meng Bong & Ors [1966] 1 MLJ 237 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Hoo Chee Keong [1997] 4 MLJ 451 (refd)
PP v Lam San [1991] 3 MLJ 426 (refd)
PP v Leong Kuai Hong [1981] 1 MLJ 246 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Muhammed Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Okonkwo & Anor [1993] 3 SLR 610 (refd)
PP v Ooi Seng Huat [1968] 2 MLJ 168 (refd)

PP v Phua Keng Tong [1986] 2 MLJ 279 (refd)
PP v Yiau Swee Tung [1999] 3 MLJ 353 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
R v Abbott [1955] 2 All ER 899 (refd)
R v Killick (1980) 24 SASR 137 (refd)
Saminathan & Ors v PP [1955] MLJ 121 (refd)
Samsudin v PP [1962] MLJ 405 (refd)
Satli bin Masot v PP [1999] 2 SLR 637 (refd)
Seneviratne v R [1936] 3 All ER 36 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (refd)
Shaw v The Queen (1952) 85 CLR 365 (refd)
Sim Ah Song & Anor v R [1951] MLJ 150 (refd)
State v Mello & Anor [1999] 1 LRC 215 (refd)
State of WB v Anwar Ali [1952] SCR 284 (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (refd)
Teoh Hoe Chye v PP [1987] 1 MLJ 220 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)
Woolmington v DPP [1935] AC 462 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 182A, 399(1)
Dangerous Drugs Act 1952 ss 2, 37, 37(d), (da), 39B(1)
Evidence Act 1950 ss 8, 9, 32(1)(i), 114, (g)
Federal Constitution art 8(1)
Misuse of Drugs Act 1973 s 15 [Sing]

Azhar bin Abdul Hamid (*Lukman bin Zainuddin* with him) (Attorney General's Chambers) for the prosecution.
Gooi Soon Seng (*Gooi & Azura*) for the accused.

Augustine Paul J: Chia Leong Foo ('the accused') was charged with trafficking in 218.79g of heroin and monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The accused claimed trial to the charge.

The prosecution, in order to make out its case, called a total of seven witnesses. They are police photographers, Kamaruzaman bin Sabirin (PW1) and Zulkifli bin Rashid (PW2); Detective Sergeant Nurazlina bte Abdullah (PW3); Inspector Mohd Alpiyang bin Ali (PW4); Inspector Tansly Mering (PW5); Detective Sergeant Hassan bin Sulaiman (PW6) and Inspector Wan Azlan bin Wan Mamat (PW7). On 26 June 1998, PW4 led a party of police officers consisting of PW6, Det/Sjn Mohd Zaman bin Yunus, Det/Kpl Haridan bin Ab Hamid, Det/Kpl Jawahir bin Supar, L/Kpl Mastoro bin Mohamad, Det/L/Kpl Hariri bin Harun, L/Kpl Azli bin Abdullah and L/Kpl Jeganathan to lay an ambush at the Caltex Petrol Station ('the petrol station') at Jalan Kuching, Kuala Lumpur. They arrived at the scene at 8pm. PW5 instructed his officers to take up various positions at the Petrol Station. PW6 was instructed to remain in motor car bearing

registration number WDR 1704 parked about 30 metres away from the road leading to the Petrol Station. PW4, together with Det/Sjn Mohd Zaman bin Yunus and L/Kpl Jeganathan, took up position at the road coming out of the Petrol Station. The sequence of events that followed, as narrated by PW4, is as follows:

> Pada jam lebih kurang 8.30 malam sebuah motosikal jenis Suzuki RGV Sport berwarna purple WFU 4399 telah masuk ke kawasan serang hendap. Det/Sjn Hassan telah mengekori motosikal tersebut dan cuba memberhentikannya. Motosikal tersebut telah dinaiki oleh dua lelaki Cina telah melintasi saya. Dalam jarak 10m saya nampak pemandu motosikal itu telah mencampakkan satu beg kain dengan tangan kirinya. Dalam masa yang sama motosikal tersebut telah merempuh penghadang jalan lalu terbabas. Saya bersama anggota bergerak ke tempat tersebut dan menahan pemandu motosikal tersebut bersama Det/Sjn Mohd Zaman bin Yunus dan Det/Sjn Hassan bin Sulaiman. Pembonceng motosikal telah bangun dan cuba melarikan diri. Dalam masa yang sama Det/Kpl Jawahir dan L/Kpl Jeganathan telah mengejar pembonceng motosikal tersebut. Lebih kurang dua minit kemudian Det/Kpl Jawahir dan L/Kpl Jeganathan menyerahkan pembonceng motosikal tersebut kepada saya. Penunggang motosikal tersebut ialah Chia Leong Foo. Saya telah mengambil beg kain yang dicampakkan oleh pemandu motosikal tersebut di atas semen penutup longkang di tepi jalan. Beg itu jatuh lebih kurang 5m dari tempat motosikal terbabas. Beg itu warna putih. Beg putih ini diambil dari raga motosikal oleh pemandu motosikal sebelum dicampakkan di tepi jalan.
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> Semasa saya ambil beg putih dari tepi jalan saya boleh pastikan beg itulah yang dicampakkan oleh pemandu kerana di atas penutup semen tersebut tidak ada beg atau sampah sarap lain. ...
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> Selepas saya ambil beg kain itu saya telah membuat pemeriksaan dengan disaksikan oleh kedua-dua saspek dan saksi polis lain. Di dalamnya saya dapati terdapat sepuluh packet plastik lutsinar yang mengandungi serbuk dan ketulan-ketulan kecil berwarna merah jambu yang saya syaki dadah heroin. Saya tangkap kedua-dua saspek dan rampas barang kes bawa balik ke Jabatan Narkotik, IPK, Kuala Lumpur.

PW4 handed the accused and the pillion rider, Yee Chin Koon, to PW5, the investigating officer, on 27 June 1998 at about 12.30am. He handed the exhibits consisting of the white cloth bag (exh P17), the ten packets suspected to contain heroin (exhs P18A–J and P19A–J), motorcycle bearing registration number WFU 4399 and two helmets, one being black (exh P9A) and the other yellow (exh P9B), to PW5 on 28 June 1998 at about 3.30am. The material parts of the cross-examination of PW4 run as follows:

> Saya nampak beg dicampakkan. Ini selepas motosikal melalui saya. Lebih kurang 10m. Pada masa itu kereta yang dipandu oleh Det/Sjn Hassan telah menghimpit motosikal itu. Penunggang motosikal pakai helmet hitam. Saya tidak setuju saya tidak boleh nampak orang yang kononnya mencampakkan beg itu. Saya tidak setuju bahawa beg putih itu dipegang oleh pembonceng semasa melalui saya. Saya tidak tahu pakaian yang dipakai oleh penunggang motosikal pada hari itu. Saya juga tidak tahu pakaian yang dipakai oleh pembonceng. Sebelum kejadian saya tidak kenal penunggang dan pembonceng motosikal.

Saya sendiri buat tangkapan penunggang motosikal. Saya tidak setuju kereta Sjn Hassan yang melanggar motosikal tersebut. Saya tidak tahu kesan motosikal dilanggar. Saya bersama Det/Sjn Mohd Zaman, Det/Sjn Hassan buat tangkapan.

Saya tidak setuju penunggang motosikal dapat kecederaan yang serius selepas jatuh dan dalam pengsan. Saya tidak tahu dia berada di hospital selama 20 hari kerana tulang belakangnya retak. Kita bawa tertuduh ke balai dan selepas itu ke hospital. Doktor kata kecederaannya tidak serius. ...

Saya tidak sedia search list. Saya tidak tahu tentang ss 64 dan 65 CPC. ...

Saya ada bawa IO ke tempat kejadian. Saya tidak tahu sama ada pada masa itu pembonceng telah dilepaskan. Saya tidak setuju dari tempat diri saya tidak boleh lihat raga motosikal. Ada kesan pecahan motosikal di tempat kejadian. Pasukan saya tidak ambil apa-apa gambar tentang kesan pecahan itu. Semasa melalui saya motosikal tersebut ditunggang perlahan dan memecut dengan laju apabila Det/Sjn Hassan menghimpit motosikal tersebut. Ia memecut dengan laju sejauh 5m sahaja. Saya berlari ke tempat motosikal jatuh.

S: Arahan saya pasukan kamu ada terima RM120,000 untuk melepaskan pembonceng.

J: Saya tidak tahu menahu tentang perkara ini dan tidak ambil tahu selepas OKT dan barang kes diserahkan kepada Insp Tansly. Saya tidak pasti motosikal itu sama ada mempunyai clutch atau tidak. Saya tidak setuju penunggang motosikal tidak membuang apa-apa.

In his re-examination PW4 said this:

Semasa motosikal itu melalui saya pandangan saya tidak dihalang oleh apa-apa kenderaan lain. Saya tidak tahu pakaian kedua saspek. Saya tidak nampak kereta yang dipandu oleh Det/Sjn Hassan melanggar motosikal tersebut. Saya boleh pasti penunggang motosikal yang campakkan beg dan bukan pembonceng kerana saya nampak tangan kiri penunggang motosikal mengambil beg dari raga motosikal dan membuangnya. Pada waktu itu motosikal terhoyong-hayang kerana dipandu dengan sebelah tangan. Semasa motosikal melalui saya tidak nampak pembonceng memegang beg atau apa-apa barang. Semasa saya tangkap tertuduh dia pakai helmet berwarna hitam.

The evidence of PW6, in narrating the course of events that led to the arrest of the accused, is as follows:

Pada jam lebih kurang 8.30 sebuah motosikal jenis Suzuki RGV No WFU 4399 telah lintasi saya. Terdapat dua orang lelaki Cina di atas motosikal. Motosikal melintasi saya di sebelah kanan saya. Penunggang motosikal pakai helmet warna hitam. Pembonceng pakai helmet berwarna kuning. Ketika motosikal melintasi saya, saya tidak nampak pembonceng memegang apa-apa barang. Saya telah mengekori motosikal dari belakang dan sampai di hujung jalan susur keluar Stesyen Minyak Caltex saya telah jerit perkataan polis kepada penunggang motosikal. Tetapi penunggang telah memecut motosikalnya. Seterusnya saya telah menghimpit motosikal tersebut. Motosikal tersebut hilang kawalan dan telah melanggar penghadang jalan di sebelah kiri jalan. Kereta saya tidak melanggar motosikal ini.

Semasa cuba melarikan diri saya nampak penunggang mencampakkan sesuatu yang diambil dari raga motosikal. Penunggang campakkan barang yang diambil dari raga dan barang tersebut jatuh di atas penutup longkang di

sebelah kiri jalan. Apa yang dicampakkan ialah satu bungkusan beg berwarna putih. Saya tidak nampak pembonceng mencampak apa-apa barang. Apabila saya nampak penunggang mencampakkan barang kereta saya berada di sebelah kanan motosikal. Kereta saya berada beriringan dengan motosikal dalam keadaan motosikal di hadapan sedikit.

Selepas motosikal jatuh saya telah berhentikan kereta dan saya telah membantu rakan saya tangkap penunggang motosikal manakala pembonceng motosikal telah melarikan diri. Kemudiannya saya diberitahu oleh rakan saya pembonceng telah ditangkap. Pada masa itu penunggang dalam keadaan cedera. Beliau dalam keadaan sedar. Saya ada nampak SP4 ambil beg yang dicampakkan oleh penunggang. Saya pasti beg yang diambil adalah beg yang dicampakkan oleh penunggang. Saya boleh camkan beg itu. (Saksi dirujuk kepada P17). Inilah beg yang dicampakkan oleh penunggang motosikal.

The cross-examination of PW6 runs as follows:

Saya setuju badan pembonceng lebih besar daripada badan penunggang.

Buat kali pertama saya nampak motosikal, motosikal telah melalui saya. Motosikal tidak laju. Selepas motosikal melalui saya, saya nampak nombor pendaftaran motosikal di bahagian belakang dan belakang pembonceng. Seterus itu saya mengekori motosikal itu. Semasa saya mengekori motosikal saya tidak nampak SP4. Sebelum saya mengekori motosikal saya tahu di mana SP4 berada. SP4 berada di susur jalan keluar dari Stesyen Minyak Caltex. Saya tahu ada anggota lain bersama dia. Tiga atau empat orang. (Saksi dirujuk kepada P11). (Saksi diminta tanda di mana motosikal berada semasa saksi nampak beg dicampakkan). (Saksi tanda dengan huruf X). Semasa beg dicampakkan saya tidak nampak SP4. (Saksi dirujuk kepada P3B). Tanda X di P11 adalah tanda A di P3B.

Dari tempat SP4 berada ke tempat X di P11 lebih kurang 10m. Saya tidak setuju pembonceng motosikal pakai helmet hitam. Saya tidak ingat pakaian pembonceng dan penunggang. Saya tidak setuju saya langsung tidak jerit 'Polis'. (Saksi dirujuk kepada P3A). Saya setuju Jalan Kuching ada tiga lorong dari arah Kuala Lumpur ke utara dan juga ada sebatang lorong keluar dari jalan susur Stesyen Caltex. Makna ada empat lorong. Saya tidak setuju motosikal berada di lorong di P3A. Saya tidak setuju saya langgar motosikal itu di bahagian tengah dan menyebabkan penunggang motosikal tercampak dari motosikalnya. Saya tidak setuju penunggang motosikal dalam keadaan pengsan. Saya tidak setuju beg itu dipegang oleh pembonceng motosikal. Saya tidak setuju penunggang motosikal tidak mencampakkan beg itu. Saya tidak setuju penunggang motosikal tidak pada bila-bila masa mencampakkan apa-apa barang.

PW5 said in his evidence that the accused and Yee Chin Koon were handed to him by PW4 on 27 June 1998 at about 12.30am. He received the exhibits relating to the case from PW4 on 28 June 1998 at about 3.30am. PW5 investigated into the ownership of motorcycle bearing registration number WFU 4399 from the Road Transport Department and found that it is registered in the name of the accused. On 14 September 1998, PW5 sent the exhibits suspected to contain dangerous drugs to the chemist for analysis. On 11 January 1999 he received the exhibits back together with the chemist report. The material parts of the chemist report read as follows:

Saya CHEONG MEOW KIOON, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia dengan ini memperakui bahawa pada pukul 1531 pada 14 September 1998 telah diserahkan kepada saya oleh Insp Tansli Mering, satu bungkusan yang bertanda 'T' dan bermeterai 'POLIS DIRAJA MALAYSIA 524'.

I examined the package 'T' submitted and found in it a cloth bag marked 'A' containing ten plastic packets of pinkish granular and powdery substance marked from 'A(1)' to 'A(10)'.

On analysis, I found the above pinkish substance in the ten plastic packets to contain heroin and monoacetylmorphines. The results of analysis are as shown below:

Packets	Nett weight of pinkish substance (g)	Weight of heroin obtained (g)	Weight of monoacetyl-morphines obtained (g)
'A(1)'	456.8	14.70	7.40
'A(2)'	456.8	14.98	7.17
'A(3)'	457.0	11.56	9.64
'A(4)'	457.7	15.60	6.45
'A(5)'	455.7	14.85	7.38
'A(6)'	456.2	16.14	5.93
'A(7)'	456.5	16.61	5.29
'A(8)'	430.4	14.71	6.15
'A(9)'	455.8	14.26	7.88
'A(10)'	457.4	13.31	8.78
Total	4,540.3	46.72	72.07

The above pinkish substances in the plastic packets 'A(1)' to 'A(10)' had all been powdered during analysis after which they were put into ten separate plastic packets supplied by me and marked with the above laboratory number followed by 'A(1)' to 'A(10)' respectively.'

On 10 February 2000, PW5 served a copy of the chemist report on the accused.

In explaining the failure of Yee Chin Koon to come as a witness, PW5 said:

Sapina ada dikeluarkan terhadap beliau. (Saksi dirujuk kepada sapina) Inilah sapina yang dikeluarkan terhadap Yee Chin Koon — ditanda sebagai P20. Sapina ini tidak dapat disempurnakan ke atas Yee Chin Koon. Saya perolehi alamat Yee Chin Koon di P20 daripada kad pengenalannya. Saya juga cuba mencari alamat terkini Yee Chin Koon di mana saya telah meminta bantuan

daripada Insp Wan Azlan untuk membuat semakan di pejabat Suruhanjaya Pilihanraya, Jabatan Pendaftaran Negara dan Pejabat KWSP. Dapati alamat Yee Chin Koon adalah 10R, Jalan Kolam Air, Sentul, Kuala Lumpur. Saya juga membuat hebahan melalui surat khabar Nanyang Siang Pau kesan Yee Chin Koon. Hebahan ini disiarkan. (Saksi dirujuk kepada satu keratan akhbar). Inilah siaran yang saya maksudkan — ditanda sebagai P21. Selepas berita ini disiarkan saya tidak terima apa-apa maklumat tentang saksi ini. Saya sendiri cuba menyempurnakan sapina di atas alamat Yee Chin Koon tetapi tidak berjaya di mana rumah tersebut sekarang diduduki oleh seorang perempuan India lebih kurang 20 tahun yang lepas. Saya ada sediakan satu ID bagi mencari Yee Chin Koon — ID ditanda sebagai P22.

In his cross-examination PW5 said that Yee Chin Koon was released after the investigation papers regarding this case were referred to the Attorney General's Chambers. This was 14 days after the arrest. He then added:

Saya tidak ambil tindakan di bawah s 118 CPC untuk mengambil bond. Saya ada merakamkan percakapan dari Yee Chin Koon di bawah s 112 CPC.

Q: Apakah tindakan kamu ambil untuk pastikan Yee Chin Koon hadir ke mahkamah sebagai saksi?

J: Tidak ada tindakan lain. Sebelum saya lepaskan Yee Chin Koon saya tidak memastikan di mana sebenarnya dia tinggal. Saya ada ambil cap jarinya. Cap jari itu ada dihantar ke Jabatan Cap Jari.

Upon further cross-examination, he said:

Dalam siasatan saya satu nama Kau Kia ada timbul. Saya ada siasat tentang nama ini. Saya ada tanya OKT.

Helmet kuning ada berlabel AGV. Saya tidak tahu ini adalah syarikat di mana tertuduh pernah bekerja. Saya tidak tahu bahawa di kedai AGV adik tertuduh bekerja.

In his re-examination PW5 said:

Saya ada keluarkan bond di bawah s 49 CPC untuk tujuan Yee Chin Koon memberi keterangan di mahkamah. Keadaan motosikal WFU 4399 sudah berlainan sekarang. Ini kerana semasa menerima motosikal saya telah membuat pendaftaran ke atas barang-barang kes di IPD Sentul. Oleh itu, adalah menjadi tanggungjawab anggota polis yang bertugas di Bahagian Pendaftaran Barang Kes memastikan barang kes dalam keadaan baik.

Daripada siasatan saya, saya telah menanyakan berkenaan dengan nama sebenar, nombor kad pengenalan dan alamat orang bernama Kau Kia. Namun begitu OKT gagal memberitahu saya siapa Kau Kia ini. Saya ada cuba tanya OKT no telefon Kau Kia. OKT tidak ingat.

PW7 testified on the steps he took to trace Yee Chin Koon. This is what he said:

Saya ada pengetahuan mengenai Jinjang Report No 5777/98. Peranan saya dalam kes ini di mana saya telah membantu SP5 membuat semakan terhadap satu penama Yee Chin Koon di KWSP, SPR dan Jabatan Pendaftaran Negara. Saya ada membuat semakan tersebut. Saya pergi ke KWSP pada 5 Mei 2000 jam lebih kurang 10.45 pagi. Saya telah tunjukkan satu borang permohonan semakan terhadap penama tersebut. Setelah serahkan borang itu dapati penama itu tiada membuat caruman di KWSP. Pegawai KWSP telah

menurunkan cop menyatakan perkara itu dalam borang. (Borang dirujuk kepada saksi) Inilah borang itu — ditanda sebagai P23. Saya pergi ke SPR pada 5 Mei 2000 jam lebih kurang 11.50 pagi. Saya ada buat satu surat permohonan. Keputusan semakan di mana pegawai SPR memberitahu saya bahawa alamat penama tersebut adalah seperti di kad pengenalan dan pegawai SPR telah tuliskan di atas surat permohonan saya. (Surat dirujuk kepada saksi). Inilah surat itu — ditanda sebagai P24. Saya pergi ke Jabatan Pendaftaran Negara pada 8 Mei 2000 jam lebih kurang 9.30 pagi. Saya gunakan satu surat permohonan semakan. Hasil semakan ialah pegawai telah memberitahu saya sesalinan kad pengenalan atas penama yang dipohon. Alamat pada kad pengenalan tersebut 10R Jalan Kolam Air, Kuala Lumpur. (Borang dirujuk kepada saksi). Inilah borang yang diberi kepada saya — ditanda sebagai P25.

At the close of the case for the prosecution the learned deputy public prosecutor offered Det/Sjn Mohd Zaman, Det/Kpl Haridan, L/Kpl Mastoro, L/Kpl Mohd Hariri, L/Kpl Jeganathan and L/Kpl Azli to the defence. Learned counsel said that he will decide on this matter later and submitted that the prosecution had not made out a prima facie case against the accused. I shall refer to the salient features of his submission when I consider the evidence adduced by the prosecution in support of its case.

The provision of the Act under which the accused has been charged reads as follows:

> 39B (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

Subsection (1) of s 39B of the Act enumerates three separate and distinct offences relating to trafficking in dangerous drugs. Section 2 of the Act defines 'trafficking' as:

> ... includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug; ...

It must be observed that most of the acts that constitute 'trafficking' as defined in s 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts

is therefore sufficient to make out a case of trafficking. Thus it is true, as the (then) Supreme Court observed in *Teh Geok Hock v PP* [1989] 3 MLJ 162 (at p 163), that '... the definition in the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication'. The offence is therefore complete upon proof of the relevant act that constitutes 'trafficking' as defined in s 2 of the Act and the purpose of such act is not material. The weight of the dangerous drugs involved is not a determinative factor (see *Leong Siew Hoong v PP* [1988] 1 MLJ 396). Personal consumption may be set up to explain the possession of the drugs (see *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289; *Ng Chai Kem v PP* [1994] 2 MLJ 210; *Chow Kok Keong v PP* [1998] 2 MLJ 337). However, as a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it (see *Ong Ah Chuan v PP* [1981] 1 MLJ 64). Be that as it may, even though the definition of 'trafficking' contemplates acts that go beyond mere or passive possession of dangerous drugs such possession can be presumed to amount to trafficking if the amount of drugs possessed exceed a certain amount in weight dependent on the nature of the drugs involved as provided by s 37(da) of the Act. Even in the absence of this presumption where a person is caught with being in possession of dangerous drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he intended to traffic in them would, in the absence of any plausible explanation by him, be irresistible (see *Ong Ah Chuan*'s case).

As most of the acts that constitute trafficking involve the prerequisite element of possession the initial matter that requires proof by the prosecution is possession. The ingredients necessary to establish possession have been considered in numerous cases. I do not find it necessary to go into them in detail except for the element of mens rea that requires to be proved. In this regard Thomson J (as he then was) said in *Chan Pean Leon v PP* [1956] MLJ 237 at p 239:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove mens rea. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v Rex* [1949] MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.
>
> If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee Boon Gan v R* [1954] MLJ 103, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

A As Lim Beng Choon J said in *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 at p 589:

> Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

As I said in *PP v Hoo Chee Keong* [1997] 4 MLJ 451 at p 459:

> Proof of knowledge is very often a matter of inference.

Thean J (as he then was) in elaborating on the manner of inferring knowledge said in *PP v Phua Keng Tong* [1986] 2 MLJ 279 at p 286:

> However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In the case of *RCA Corp v Custom Cleared Sales Pty Ltd* [1978] FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p 478:
>
> > 'Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case.'
>
> And the court further said, at p 579:
>
> > 'It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.'

It is therefore clear that knowledge can be proved by drawing inferences from surrounding circumstances. I shall refer to two cases to illustrate proof of knowledge by the drawing of inferences. The first is *Director of Public Prosecutions v Wishart Brooks* [1974] AC 862. In that case a number of police officers saw a van with its engine running parked on a lay-by near an airstrip. On the approach by the police officers, the respondent, who was the driver, and others who were in the cab of the van attempted to run away. The respondent was caught by the police. In the body of the van, which was neither visible nor accessible from the cab, were 19 sacks containing over 1,000 pounds of ganja. The respondent's conviction was quashed by the

Jamaican Court of Appeal on the ground that it was not shown that he had more than mere custody or charge of the van and its contents and that there was no evidence that he had possession of the ganja. The Privy Council, in allowing the appeal, held that the technical doctrines of the civil law about possession were irrelevant to this field of criminal law and added at pp 866–867:

> In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal statute as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which bring about the separation of propriety and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in *Reg v Livingston* (1952) 6 JLR 95 it is, in their Lordship's view, wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only actus reus required to constitute an offence under s 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The mens rea by which the actus reus must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3).
>
> Upon the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van.

The second case is *Neo Koon Cheo v R* [1959] MLJ 47. In that case a raid was made by a detective sergeant, a detective corporal and a detective on the attic of No 26, New Bridge Road, on 21 January 1958 at about 8.20pm On entering the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. In holding, in the alternative, that the evidence was sufficient to make out a case against the appellant for possession of prepared opium and smoking utensils Ambrose J said at p 50:

> If my interpretation of s 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under s 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was

endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic it must be presumed, until the contrary is proved, under s 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless the presumption under s 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the chandu and chandu dross.

I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under s 8 of the Evidence Act 1950. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v State* (1996) Cri LJ 2201). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid*'s case). For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411 at p 413:

> It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr Duckett QC on behalf of the crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.
>
> In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had been made by the police to find them and with what result. Leung, in his statement to the police after his arrest, gave them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result. It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.
>
> In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question. In this case the prosecution produced no evidence to establish that either of the

appellants had been hiding away or otherwise behaving in an unusual manner in this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.

Evidence of such conduct can be explained away by the accused as provided by s 9 of the Evidence Act 1950 (see *Ling Ngan Liong v PP* [1964] MLJ 20; *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423). However, the onus is on the accused to explain his conduct. Thus in *Mansor bin Mohd Rashid* 's case, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v R* AIR 1941 Orissa 517).

Having dealt with the manner of proving possession and trafficking by direct evidence and by drawing inferences from proved facts it is perhaps necessary to consider the applicability of presumptions as contained in the Act in the proof of such elements. As a matter of law a presumption is a statutory invention that upon proof of a fact, called a basic fact, an inference of another fact, called the presumed fact, can be drawn (see *PP v Ooi Seng Huat* [1968] 2 MLJ 168). In truth, therefore, a presumption is a statutory direction as to the drawing of inferences (see *Tong Peng Hong v PP* [1955] MLJ 232). Thus it operates in place of evidence as it deems certain facts to have been proved (see *Ng Kim Huat v PP* [1961] MLJ 308). Presumptions therefore do not deal with admissibility of evidence (see *PP v Cheng Meng Bong & Ors* [1966] 1 MLJ 237) but with a special mode of proving facts which must otherwise be proved by evidence. Where a presumption is mandatory, in the sense that the presumed fact must be found to exist upon proof of the basic facts, and is rebuttable it is termed as a rebuttable presumption of law. The words 'shall presume' in presumptions of law only mean that upon proof of the basic facts the court is bound to take the fact to be presumed as having been proved as opposed to the words 'may presume' in presumptions of fact like in s 114 of the Evidence Act 1950 which only gives the court a discretion to raise the presumptions contained therein. Since presumptions do not deal with admissibility of evidence but only with a mode of proof a matter of concern is whether the facts to be presumed can, instead, be proved by other admissible evidence which is available. The right of not relying on presumptions in such circumstances has been recognized in several cases of high authority. In *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 the (then) Supreme Court said that the prosecution 'may' rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. This shows that the ingredients to be proved can be established by other evidence. In *Neo Koon Cheo*'s case Ambrose J said that a conviction for dangerous drugs can be supported without having recourse to the presumption under s 37(d) of the Act. The judgment of the Federal Court in *Haryadi bin Dadeh v Pendakwa*

Raya [2000] 4 MLJ 71 implies that an 'express finding of possession' can be made without resorting to s 37(d) of the Act. The view expounded by the Federal Court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 and *Mohd Said bin Samad v PP* [1998] 2 MLJ 294 that there must be an affirmative finding of possession based on sufficient and admissible evidence before the presumption of trafficking under s 37(da) of the Act can be invoked shows that what can otherwise be presumed to exist can be proved by direct evidence. In *Ong Ah Chuan*'s case Lord Diplock, in commenting on s 15 of the Singapore Misuse of Drugs Act 1973 which deals with the presumption of trafficking, said at p 69:

> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15.

It was further observed in that case at p 70 that '... there was no need for the prosecution to rely on any presumed possession for which ss 16 and 19 provide'. This was obviously because there was sufficient evidence, on the facts of the case, to establish possession. The authorities that I have referred to only show that a finding may be made without the need to resort to presumptions where there is direct evidence of the facts to be presumed. However, they do not indicate whether a presumption can still be invoked by disregarding direct evidence that can equally establish the facts to be presumed. In resolving this issue I consider it pertinent to refer to some presumptions contained in s 37 of the Act ('the presumption provisions') which read as follows:

> In all proceedings under this Act or any regulation made thereunder —
>
> ...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of —
>
> ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; ... .

Before analysing the scope of the presumption provisions it must first be observed that penal provisions like these must be strictly construed and must not be extended beyond their clear meaning (see *Liew Sai Wah v PP* [1968] 2 MLJ 1, *PP v Leong Kuai Hong* [1981] 1 MLJ 246). Thus as Chong

Siew Fai CJ (Sabah & Sarawak) in referring to these cases said in *Muhammed bin Hassan* 's case at p 288,

> The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsection must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

The clear meaning of the presumption provisions is that upon proof of certain facts another fact shall be presumed to have been proved. In the case of s 37(d) of the Act the presumption of possession and also of knowledge of the nature of the drug arises upon proof of custody or control of anything whatsoever containing the drug. The language of the subsection makes it clear that it is activated upon proof of custody or control of anything whatsoever containing the drug. The matters to be presumed are the additional elements necessary to constitute possession. Similarly, in the case of s 37(da) of the Act upon proof of possession of the drugs a presumption of trafficking arises without proof of any of the acts that constitute 'trafficking' as defined in s 2 of the Act. The applicability of the presumption provisions must be considered against this background. Their language shows that they have been enacted to provide evidence of the facts to be presumed upon proof of the basic facts. It is these basic facts that raise the presumed facts. Thus they contemplate a situation where there is no evidence of the facts to be presumed. Where there is such evidence and the presumption provisions are still invoked it would mean that what has been proved to exist has, at the same time, also been presumed to exist. This is illogical as it would amount to facts which have been proved as also having been presumed. This would go beyond the explicit words and object of the presumption provisions as they are designed to meet a situation when there is no evidence of the facts to be presumed. As I said earlier presumptions are only a special mode of proving facts which must otherwise be proved by evidence. It follows that where there is such other evidence presumptions cease to apply as such evidence, being not inadmissible, is capable of proving the very facts to be presumed. Presumptions are therefore restricted in their operation to instances where there is evidence only of the basic facts. The limitation on the use of the presumption provisions in the face of available evidence can be discerned if the ramifications of their use in such circumstances are considered. It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *PP v Yuvaraj* [1969] 2 MLJ 89; *Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State*

v Mello & Anor [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. Arbitrary use of the presumption provisions, without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way. When the presumption provisions are invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art 8(1) of the Federal Constitution which guarantees equal protection of the law. It has been held that the guarantee of equal protection applies against substantive as well as procedural laws (see *Lachmandas v State of Bombay* [1952] SCR 710; *State of WB v Anwar Ali* [1952] SCR 284; *Kewal Singh v Lajwanti* AIR 1980 SC 161; *Chandra Bhawan v State of Mysore* (1969) II SCWR 750). From the standpoint of the latter it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination (see *Shorter Constitution of India* by DG Basu (12th Ed) p 51). It follows that where there is direct evidence of a fact to be presumed the presumption cannot be invoked on the basis of a discretion. The rule must be applied equally to all cases that fall within the same class so that there is no discrimination in the manner of conducting the defence. That would amount to a reasonable classification for the purpose of art 8(1) of the Federal Constitution. I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved. I pause to add that it is the interest of the accused that compelled Rubin JC (as he then was) to say in *PP v Okonkwo & Anor* [1993] 3 SLR 610 that the intention of the prosecution to rely on a presumption must be intimated to the defence to enable the preparation of an appropriate line of cross-examination. This may be done by the prosecution in its opening address.

It is now appropriate to consider whether the prosecution has made out a prima facie case against the accused. The facts of this case reveal that at the material time the accused was riding motorcycle bearing registration number WFU 4399 with Yee Chin Koon as pillion rider. The motorcycle was registered in the name of the accused. When the motorcycle passed PW6 he did not see Yee Chin Koon holding anything. PW6 followed the motorcycle from behind and upon arrival at the road coming out of the petrol station shouted the word 'Police' at the accused. However the

accused accelerated the speed of his motorcycle. When the accused was thus trying to escape PW6 saw him taking out a white bag from the carrier of the motorcycle and throwing it away. He did not see Yee Chin Koon throwing anything. PW6 then came closer to the motorcycle. The motorcycle lost control and knocked into the road divider. The accused and Yee Chin Koon fell down. Yee Chin Koon who got up and tried to escape was chased and arrested by two police officers. PW6 said that he saw PW4 taking the bag which the accused had thrown. He confirmed that the bag retrieved by PW4 was the bag that the accused had thrown. The evidence of PW4 was in line with the testimony of PW6. It was found that the bag had ten plastic packets suspected to contain heroin. Upon analysis by the chemist they were found to contain 218.79g of heroin and monoacetylmorphines. It was suggested to PW4 and PW6 in cross-examination that the white bag was held by Yee Chin Koon; that the motorcycle was knocked into from behind; that the accused wore the yellow helmet at the material time and that he did not throw the white bag. These suggestions were denied by the two witnesses. As I explained in *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 121:

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. In this regard, it was observed in *Emperor v Karimuddi Sheikh* AIR 1932 Cal 373:
>
> > 'Mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution'.

I am therefore unable to consider them as evidence at this stage of the trial resulting in only an evaluation of the evidence adduced by the prosecution. I found PW4 and PW6 to be credible witnesses and therefore accepted their version of the sequence of events.

Having accepted the evidence as adduced by the prosecution the next matter that requires consideration is whether the accused was trafficking in the dangerous drugs in question. The white bag containing the dangerous drugs was in the carrier of the motorcycle. It was therefore clearly visible to the accused. He was the owner of the motorcycle. He was riding it at the material time. He was therefore in charge of the motorcycle. These facts lead to the inference that he was in custody or control of the white bag in the carrier of the motorcycle. I must add that it may not be possible to draw such an inference if he was not the owner of the motorcycle. In this regard I refer to *PP v Lin Lian Chen* [1992] 2 MLJ 561 where Edgar Joseph Jr SCJ said at p 567:

> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.

The further fact that it was the accused who took the bag from the carrier and threw it away (see *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314) coupled with the fact that he attempted to flee in such circumstances by accelerating the speed of the motorcycle when confronted by the police connects him to the offence with which he has been charged. The combined effect of the inferences is that the accused was in possession of the white bag at the material time and knew the nature of its contents as shown by *Wishart Brooks*'s case and *Neo Koon Cheo*'s case to which I have made reference earlier. The large quantity of drugs involved, being about 14 times the amount which would suffice to raise the presumption of trafficking, show that they were not intended for the personal consumption of the accused. As he was transporting the dangerous drugs at the material time the prosecution has made out a prima facie case of trafficking against him. I did not consider it appropriate to rely on the relevant presumptions provided by the Act in view of the evidence available to make out the charge against the accused.

It is my view that the liability of the accused is not in any way affected by the presence of Yee Chin Koon with him at the time of the arrest. This is because the prosecution has made out a clear and complete case against the accused. The only evidence against Yee Chin Koon is his act of running away which, in the absence of other evidence, only shows knowledge by him of the possession of the dangerous drugs by the accused. Thus the principle laid down in *R v Abbott* [1955] 2 All ER 899, applicable also to cases where one of the persons involved is not charged as explained in *PP v Muhammed Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 901, that:

> ... If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finnemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case ...

does not apply to the fact of this case. Even if Yee Chin Koon is jointly liable with the accused the fact that the prosecution has made out a prima facie against the accused does not thereby affect the charge against him. What, perhaps, requires consideration is whether Yee Chin Koon is a material witness who ought to have been called as a witness by the prosecution.

The prosecution led evidence to show that Yee Chin Koon cannot be traced. Learned counsel for the accused contended that even if it was not possible for the prosecution to have called him as a witness at least the

statement made by him to the police under s 112 of the Criminal Procedure Code ought to have been adduced in evidence as he is a material witness. Failure to do so, he submitted, would warrant an adverse inference to be drawn against the prosecution pursuant to s 114(g) of the Evidence Act 1950 ('s 114(g)'). It is well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth (see *Khoon Chye Hin v PP* [1961] MLJ 105). But there is an obligation on the prosecution to call as witnesses persons whose evidence is essential to unfold the narrative upon which its case is based (see *Seneviratne v R* [1936] 3 All ER 36). Thus as Abdul Hamid CJ (Malaya) (as he then was) said in *Teoh Hoe Chye v PP* [1987] 1 MLJ 220 at p 229:

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v PP* [1985] 2 MLJ 16). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

Thus the question to be asked in each case is whether the prosecution has proved its case even without calling some other witnesses who are available. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden (see *Namasiyiam & Ors v PP* [1987] 2 MLJ 336; *Kadir bin Awang v PP* [1989] 2 MLJ 33; *Jazuli bin Mohsin v PP* [1990] 2 MLJ 190; *Lim Young Sien v PP* [1994] 2 SLR 257). As Yong Pung How CJ said in *Chua Keem Long v PP* [1996] 1 SLR 510 at pp 523–524:

> The appellant's contention was that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is that there were no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

In such circumstances it is also not necessary for the prosecution to offer or make available the remaining witnesses to the defence. As Yong Pung How CJ said in *Satli bin Masot v PP* [1999] 2 SLR 637 at p 649:

> We were of the view that when s 116 illustration (g) (our s 114(g)) is sought to be invoked on account of the prosecution's failure to offer particular witnesses to the defence, the rule should be no different from a case where the contention is that the prosecution has failed to call particular witnesses. In both cases, whether an adverse inference should be drawn should depend on the materiality of the witness not called/offered and whether the failure to do so constitutes a withholding of evidence from the court or the accused. On our facts, just as there was no basis for drawing an adverse inference against the prosecution on account of their failure to call the two named CNB officers as witnesses, we were of the view that there was similarly no basis for drawing an adverse inference against the prosecution on account of their failure to offer the two officers to the defence.

This principle has been recognized by our Federal Court in *Mansor bin Mohd Rashid*'s case and the Court of Appeal in *Lee Lee Chong v PP* [1998] 4 MLJ 697 where it was held, on the facts of the cases, that the failure by the prosecution to call witnesses or to make them available to the defence at the close of its case was not fatal at that stage. I pause to add that the prosecution cannot, in an attempt to prevent an adverse inference being drawn, offer material witnesses to the defence without calling them to testify if, to do so, would result in there remaining gaps in its case. In this regard I refer to *Abdullah Zawawi v PP* [1985] 2 MLJ 16 where Salleh Abas LP said at pp 18–19:

> But where the prosecution evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

Thus cases such as *Samsudin v PP* [1962] MLJ 405 and *PP v Chee Kon Fatt* [1991] 3 CLJ 2564 which enunciate that an adverse inference cannot be drawn against the prosecution if witnesses are offered to the defence must be read with caution. Where the evidence of a witness is material he must be called to testify. Offering him to the defence, in such circumstances, will not prevent an adverse inference being drawn. What, however, is critical is that where the prosecution has proved its case it is no part of its function to call witnesses in order to discharge the evidential burden on the accused (see *Seneviratne*'s case; *PP v Dato' Seri Anwar bin Ibrahim (No 3)*). In this case I have found that the prosecution has made out a prima facie case against the accused. This means that the prosecution has led sufficient evidence to unfold the narrative of its case. Thus its failure to call Yee Chin Koon as a witness or make him available to the defence is not fatal at this stage. Needless to say, if he is a material witness then, in the absence of him being traced, there would be a burden on the prosecution to tender his statement recorded under s 112 of the Criminal Procedure Code as evidence under s 32(1)(i) of the Evidence Act 1950.

Be that as it may, the failure by the prosecution to call Yee Chin Koon as a witness or, alternatively, to have tendered his police statement in evidence is a perilous course to be adopted. I say this because the

prosecution is expected to negative in its case in chief the explanations that the defence could be expected to advance in answer to the allegations against it (see *Evidence: Proof and Practice* by Graham Roberts (1st Ed) p 376). It is the case for the defence as suggested to PW4 and PW6 in their cross-examination that the bag was held by Yee Chin Koon; that the motorcycle was knocked into from behind; that the accused wore the yellow helmet at the material time and that he did not throw the white bag. These suggestions were categorically denied by PW4 and PW6 and thus cannot be considered as evidence at this stage of the trial as I said in an earlier part of the judgment. Therefore the suggestions put to the prosecution witnesses by the defence do not play any part in determining the materiality of Yee Chin Koon at this stage of the trial. However, it would have been prudent for the prosecution to adduce such evidence in the course of its case as is reasonably available to it to rebut the defences suggested because the legal burden on the prosecution does not end once it has made out a prima facie case. The burden of proof on the prosecution is governed by s 182A of the Criminal Procedure Code which reads as follows:

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

This is a re-statement of the common law position as formulated in the celebrated case of *Woolmington v DPP* [1935] AC 462 where Lord Sarkey LC said at pp 481–482:

> Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners' guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Thus where the prosecution has made out a prima facie case and the accused, in his defence, offers an explanation, the burden of proof to establish the offence beyond reasonable doubt is still on the prosecution and if, upon a review of the evidence on both sides, there is a reasonable doubt, the accused must be acquitted. This may arise if, on the facts of this case, the matters suggested to PW4 and PW6 in their cross-examination have been crystallized into evidence by the defence in its case. In order to ensure that its case has been proved beyond reasonable doubt at the end of the

defence case the prosecution must negative the defences raised. As *Cross on Evidence* (7th Ed) says at p 145:

> Once the party who bears the evidential burden has discharged it by adducing evidence sufficient to justify consideration of a particular issue, it becomes necessary for the party bearing the legal burden on that issue, the proponent, to persuade the trier of fact that it should be decided in his favour.

As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence. In seeking to adduce such rebuttal evidence the prosecution will be confronted with a problem as the general rule is that the prosecution must present its primary case completely before closing its case. This will include negating the case for the defence as suggested to its witnesses in cross-examination. A failure to observe this rule will result in the prosecution being precluded from adducing evidence in rebuttal on the ground that it would amount to the prosecution splitting its case. However, there is a discretion to allow evidence in rebuttal in very special or exceptional circumstances (see *Shaw v The Queen* (1952) 85 CLR 365). This was lucidly explained by Wells J in *R v Killick* (1980) 24 SASR 137 at pp 152–154:

> The topic of rebuttal evidence rarely comes up for review in the Court of Criminal Appeal and it may be useful, as part of my reasons for judgment, if I attempt to formulate the propositions, in relation to that topic, that now appear to me to be sustainable.
>
> (1) Speaking generally, the prosecution must present completely the evidence that supports the incriminating circumstances upon which it relies to constitute its primary case. A failure to observe this rule is likely to result in the prosecution's being forbidden to introduce further evidence after the accused has presented his defences upon the ground that the prosecution would be splitting its case.
>
> (2) Clear exceptions to the general rule are recognized where by law, in the special circumstances of the case, the onus of proof rests upon the defence. In such cases, the prosecution may, after the special defence is concluded, adduce evidence directed to the task of rebutting that defence.
>
> (3) The trial judge possesses a power, which is exercisable having regard to all the circumstances of the case, to allow rebuttal evidence, but the power will not generally be exercised in favour of allowing rebuttal evidence unless those circumstances are 'very special or exceptional' (*Shaw*'s case (1952) 85 CLR 365 at p 380). The judicial power is usually described as a discretion, but I prefer to describe it as a power coupled with a duty to make an evaluation of what is, viewed in the context of the trial, the initial Crown case, and to decide whether the Crown is attempting to improve on something it has already begun, or whether it is seeking to refute something that can reasonably be characterized as fresh material contained in the defence case.

(4) A practical consequence of the foregoing rules is that, to the extent that the accused, in the course of an interview with law enforcement officers (undertaken by them as part of the investigations that led to the charges faced by him), or in the course of a statement made upon his committal for trial, foreshadowed the defence that he subsequently put forward, the Crown should, speaking generally, as part of its primary case, adduce such evidence as is reasonably available to them to refute the defence so foreshadowed. The Crown would not be expected to go beyond the limits set by the Privy Council in *Noor Mohammad v The King* [1949] AC 182, at p 191.

The rationale for what, I apprehend, is a well-settled practice is that the interview, assuming that evidence of it is to be led, and the statement on committal, which is admissible according to s 110 of the Justices Act, 1921-1979, are so closely integrated with the prosecution case that they are fit to be included in the same general category as other incriminating circumstances that are relied on by the Crown and supported by evidence and argument. Even here, however, there may be room for the trial judge to exercise his judgment, for the alibi or other special defence may, when first revealed, lack particularity, and if that particularity is furnished only at the trial, and not on either of the other two occasions, the Crown are not expected to exhibit powers of imagination and invention, and attribute to the accused a defence which has not yet really been disclosed. (Compare the particularly trenchant comment of Phillimore J in *R v Froggatt* (1910) 4 Cr App Rep 115 at p 118, arguendo).

(5) Another kind of case where rebuttal evidence is likely to be appropriate, and which is encountered far too often in practice, is to be found where one side has failed to comply with the rule of practice and common fairness usually identified by the description 'the rule in *Browne v Dunn* (1893) 6 R 67 (HL)'. In such a case, it will emerge that one side has failed to put part of its case to a witness, called by the other side, who is concerned with that part, and has then led evidence from its own witness or witnesses as to the matters not put. When this occurs, the party whose witness has been thus wronged usually has the clear right to recall that witness in order to enable him to deal specifically with the matters not previously put to him.

(6) Where the prosecution is, or reasonably appears to be, relying, in its primary case, upon a particular incriminating circumstance, though the evidence supporting it is weak, and the answer made by the accused changes the structure of proof of that circumstance so that, if permitted, the prosecution could lead further evidence that would, in the changed circumstances, greatly strengthen that proof, it is to be expected that an application to call that further evidence would be refused.

(7) The distinction is, however, clear and fundamental between the sort of case described in para 6 above (which is derived from the particular facts in *Shaw*'s case (1952) 85 CLR 365) and the sort of case discussed by James J in *Reg v Levy and Tait* (1966) 50 Cr App Rep 198 where evidence, at the stage in the trial when the primary prosecution case is in proof, is known to the prosecution, but is of minimal, doubtful, or marginal value. If, in the latter sort of case, after the defence has been presented, the same evidence appears to be of clear probative force, the evidence may well be allowed to be led in rebuttal. It is a question of fact and degree in each case.

A (8) The foregoing propositions do not purport to be exhaustive; they are intended to be no more than a summary of some of the more frequently encountered applications of the general rule, which is based upon broad considerations of fairness.

On the facts of this case the prosecution may find it difficult to adduce the B evidence in rebuttal of Yee Chin Koon as it had been in its possession from the very beginning and as it had already been put to the prosecution witnesses by the defence. This means that the prosecution was already aware of the defences to be raised. It cannot be said that the suggested defences were of minimal, doubtful or marginal value at that stage and having assumed probative force when the defence was presented warrant C evidence in rebuttal to be allowed. When the defences were suggested they struck at the very core of the prosecution case thereby negating the argument that they were of minimal, doubtful or marginal value at that stage. It may therefore be argued that the prosecution ought to have adduced the evidence in the course of its case and not by way of rebuttal. The inability of the prosecution to bring on record the evidence of Yee Chin D Koon at the close of the defence case, if deemed necessary, may therefore attract s 114(g) against it even at that stage. In this regard *Law of Evidence* (16th Ed) Vol I by Woodroffe & Amir Ali says at p 395:

> Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really E assumptions of fact which may be made at any stage of a case.

The presumption arising under s 114(g) is one of fact. It can therefore be raised at the end of the whole case. This is logical as the legal burden to prove the case is on the prosecution till the conclusion of the case. It is at the conclusion of the trial that the court will consider all the evidence F adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. This exercise will necessarily entail a consideration of whether the defences advanced, where reasonable, have been negated by the prosecution. This can only be done by an evaluation of the evidence of witnesses who have been called by the prosecution and G evidence which could have been adduced but was not. The exercise may reveal that the evidence of a witness not called, though not material at the close of the case for the prosecution, has turned out to be crucial in the light of the defence presented. The absence of the evidence of that witness on record at that stage may lead to the inference that if he had been called to testify by the prosecution in the course of its case his testimony would have H been unfavourable within the meaning of s 114(g). It cannot be argued that the burden would be on the accused to call Yee Chin Koon as a witness. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other (see *Goh Ah Yew v PP* [1949] MLJ 150; *Abu Bakar v R* [1963] MLJ 288; *Tan* I *Foo Su v PP* [1967] 2 MLJ 19). It is not the duty of the defence to fill in any gap in the prosecution case. The position is different where a presumption has been invoked thereby placing an onus on the accused to prove certain

facts. Where there is such a burden on an accused the onus is on him to prove the facts and failure to call a material witness to establish the facts may result in an adverse inference being drawn against him (see *Baharom v PP* [1960] MLJ 249; *PP v Dato' Seri Anwar bin Ibrahim (No 3)*). This, of course, is not the position in this case. The materiality of Yee Chin Koon therefore remains to be seen in the light of the defence to be advanced.

I shall now consider the objection relating to the chemist report raised by learned counsel for the defence. The report had been served on the accused pursuant to s 399(1) of the Criminal Procedure Code ('s 399(1)'). No notice was served by the accused on the Public Prosecutor, as required by the section, to call the chemist as a witness. Accordingly, the chemist report was tendered in evidence. The objection of learned counsel is that the report is defective as it does not mention the tests carried out by the chemist in coming to his conclusion. It must first be observed that a report of the category of persons specified in s 399(1) is rendered admissible as a substitute for oral evidence that would otherwise require to be given. It is therefore superfluous to state that the report must contain what its maker himself would state in evidence if he had been called as a witness to testify. With regard to the evidentiary value of an incomplete report tendered in evidence under s 399(1) useful reference may be made to the Federal Court case of *Lo Fat Thjan & Ors v PP* [1968] 1 MLJ 274 where Barakbah LP said at pp 276–277:

> As to the first point, it may be stated, without fear of contradiction, that reasons may or may not be necessary, according to the circumstances of each case. Certain simple facts observed may be wholly sufficient for the examiner to state his conclusion or finding as a straight deduction therefrom. On the other hand, there may be conclusions reached after a series or chain of inferences based on a diversity of facts which at various stages may be so ambiguous as to admit of different interpretation. Therefore, it is our opinion that there cannot be any general rule of universal application laid down that every report under s 427 stating a finding or conclusion must be supported by reasons. The weight or value of every such report must depend on the report itself and the circumstances of each case. If any party thinks it in his own interest to impugn it, he may either rely on any inadequacy or infirmity in the report himself or he may require the examiner produced for cross-examination. The option is in his hands and nothing can be fairer.

Thus the evidentiary value of a report tendered in evidence which does not state the reasons for the conclusions reached would depend on the facts of each case. Where reasons are required to be given, and the report does not do so, the party concerned may rely on the deficiency or may require the maker of the report to be produced for cross-examination. It is my view that the reference in the above passage to '... simple facts observed ...' as not requiring reasons to be stated contemplates evidence of fact as opposed to evidence of opinion. Where the report relates to a matter pertaining to expert evidence then the report must contain the reasons for the conclusion. This is because s 51 of the Evidence Act 1950 stipulates that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. It has been held that a bare expression of opinion

has no evidentiary value at all (see *Sim Ah Song & Anor v R* [1951] MLJ 150; *Lai Yong Koon v PP* [1962] MLJ 327; *PP v Yiau Swee Tung* [1999] 3 MLJ 353). If therefore the evidence of the chemist who analysed the drugs in this case is opinion evidence then the report tendered in evidence must contain particulars of the tests that he had carried out as being reasons for his conclusion. This issue arose for consideration in the (then) Supreme Court case of *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 where Abdul Hamid Omar LP said at pp 271–272:

> It is to be observed that the task of the chemist is to identify the nature of the drug and, as held in *Rooker v Rooker* 164 ER 1379 at p 1380 that 'identification is a question of fact, to be proved, like any other conclusion of fact, either by direct or circumstantial evidence.
>
> In identifying a drug, a chemist conducts various tests and the result of the tests conducted by him will reveal the nature of the drug. In the process, he identifies the drug by direct observation of the result of the experiments and, by the same token, he ascertains its weight by using scientific methods. In this respect, AB Wilkinson in *The Scottish Law of Evidence* at p 63 says that 'where the identification is by experts using scientific criteria, the opinion is nearly always based on impression and not on conscious reflection on data'. Viewed in that light, the chemist's conclusion is clearly based on objective observation of facts as immediately perceived by him. The question of subjective assessment and interpretation of the nature of the drug analysed does not come into play at all for the simple reason that it is not based on any opinion.
>
> Be that as it may, we hasten to add that a chemist's evidence may be impugned by adducing evidence to show that his findings are not valid scientifically as was successfully done by the accused in *PP v Ang Soon Huat* [1991] 1 MLJ 1.
>
> In the premises, it is clear that the evidence of the chemist on the identity and weight of the drug constitutes evidence of fact and not of opinion. (See also the case of *State of Gujarat v Shantaben* AIR 1964 Guj 136). The chemist's evidence on the identity of the drug is factual evidence and not opinion evidence within the meaning of s45 of the Evidence Act 1950. Such evidence is therefore admissible in a court of law either given by him orally like any other witness or, as is specially provided by law, can be set out in a report admissible pursuant to and in accordance with s 399 of the Criminal Procedure Code (FMS Cap 6) ('the Code').

As the evidence of a chemist on the analysis of drugs by him is not evidence of opinion but evidence of fact, he need not give particulars of the tests carried out by him in his evidence. It follows that his report, tendered in evidence under s 399(1), also need not contain such particulars. In any event it has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v PP* [1987] 1 MLJ 492, *PP v Lam San* [1991] 3 MLJ 426 and *Khoo Hi Chiang*'s case that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. Thus if the accused is dissatisfied with the conclusion reached by the chemist it is for him to summon the chemist as a witness for that purpose or adduce

evidence in rebuttal. This has not been done by the accused in this case. The chemist report tendered in evidence in this case is therefore not defective.

I then ruled that the prosecution had made out a prima facie case against the accused and called upon him to enter his defence. When the three alternatives were explained to the accused he elected to give evidence on oath. He called two other witnesses to testify on his behalf.

The accused (DW1) said in his evidence that on 26 June 1998, Yee Chin Koon came to his house at about 6pm to return a sum of RM100 that he had borrowed. A friend of Yee Chin Koon dropped him there. Yee Chin Koon then entered the house. He was carrying a white bag (exh P17) and a black helmet (exh P9A). The accused had seen Yee Chin Koon carrying this bag on a previous occasion. When Yee Chin Koon entered the house with the bag and helmet the accused's younger sister, Chia Yoke Ying (DW2), was also there. She served him with a glass of water. The accused's mother (DW3) was also there. DW3 asked the accused when he would be going to his aunty's house at No 14, Jalan Daya 5/1, Taman Daya, Kepong to collect some medicine for her. He said that he would go there after 7pm when the Chinese movie that he was watching on television ended. When the accused left at 8pm Yee Chin Koon asked him to give him a lift to 7-Eleven which is situated after the toll gate at Jalan Kuching. When they left Yee Chin Koon was wearing the black helmet. The white bag was on his lap between the accused and him. The accused was wearing a yellow helmet (exh P9B) which he had bought from a shop called High Light Park Industry where DW2 works. He himself had worked in that shop for a while. Before they reached the toll gate at Jalan Kuching the accused was knocked into by a car. He was thrown off the motorcycle about 20ft away and was injured. At that time he did not know where Yee Chin Koon was. He saw Yee Chin Koon throwing something. He denied that the police shouted 'Police' and that he sped off. He denied that he picked the bag from the carrier of his motorcycle and threw it. He denied that he knocked into the kerb as a result of the police chasing him. He said that there were several deep scratches on his helmet which were not there when he was arrested. The black helmet did not have any deep scratches. He said that there was a dent on the right side of the exhaust pipe of his motorcycle caused by the car knocking into it and that it was not there prior to the incident. When he was arrested he was shown the bag. As a result of the injuries sustained by him he was hospitalized from 27 June 1998 to 15 July 1998 and when he was taken to Sungei Buloh prison he was in the prison hospital for two months. In his cross-examination the accused said that he had known Yee Chin Koon for about two years. He had seen Yee Chin Koon carrying exh P17 on a previous occasion. He denied that the bag is his and that it does not belong to Yee Chin Koon. He denied that the word 'Police' was shouted when he arrived at the toll gate. He denied that he then picked up speed in an attempt to run away. He denied that exh P17 was in the carrier of his motorcycle and that he threw it away.

DW2 said that on 26 June 1998 she had opened the door of her house to let in Yee Chin Koon. He was carrying exhs P17 and P9A. She then

served him with a glass of water. The accused later left the house with Yee Chin Koon. DW2 saw the accused holding exh P9B. It was a yellow AGV helmet which she had bought for him from High Light Park Industry where she works. She said that her mother had asked the accused to collect some medicine for her from her aunty's house in Kepong. She visited the accused in the hospital on 27 June 1998 with DW3 but he could not talk. In her cross-examination she denied that she did not buy exh P9B for her brother.

DW3 said that she had asked the accused to collect some medicine for her from her sister in Kepong. She said that Yee Chin Koon came to her house on 26 June 1998. She saw him holding a bag and a helmet. She had visited the accused in the hospital on 27 June 1998. He could not talk. In her cross-examination she denied that Yee Chin Koon did not come to her house.

It is trite law that the explanation of an accused has to be considered together with the rest of the evidence in the case and that he will be entitled to an acquittal if, as a result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that that fact exists (see *Saminathan & Ors v PP* [1955] MLJ 121). It is the case for the prosecution that the white bag was in the carrier of the motorcycle that the accused was riding and that he had thrown it; that the motorcycle fell down as it lost control and that the accused was wearing the black helmet while Yee Chin Koon was wearing the yellow helmet. These facts were denied by the accused. He said in his evidence that the bag was brought to his house by Yee Chin Koon and that it was on the lap of the latter when they were travelling. He denied having thrown the bag. He said that he saw Yee Chin Koon throwing something. DW2 confirmed that Yee Chin Koon brought the bag and the black helmet with him to their house on 26 June 1998. The evidence of the accused and DW2 that the yellow helmet was bought from High Light Park Industry was not effectively challenged by the prosecution. It was only suggested to DW2 that she did not buy it for the accused which she denied. This is an appropriate instance where the prosecution could have called a representative from High Light Park Industry to rebut the defence evidence on the purchase of the helmet. This was not done. Failure by the prosecution to rebut this evidence means that if such evidence in rebuttal had been adduced it would have been adverse to the prosecution. It must therefore be accepted that the helmet was purchased as testified by the defence. DW2 also said that the accused was holding the yellow helmet when he was leaving the house with Yee Chin Koon. This was not challenged by the prosecution. The existence of the deep scratches on it which were not there when the accused was arrested was not challenged by the prosecution. This evidence, coupled with the fact that it belonged to the accused and that he was holding it when he left the house, supports the inference that it was the accused who was wearing it at the material time as he was the one who fell down. The evidence of the accused about the dent on the motorcycle which was not there prior to the incident was also not challenged by the prosecution. This supports the inference that the motorcycle was knocked into from the rear as testified by the accused.

The doubt created by the defence on the person who was wearing the yellow helmet and the reason why the motorcycle fell raises doubts as to the person who actually threw the white bag. Upon a consideration of the whole of the evidence adduced I am satisfied that the defence had raised a reasonable doubt in the prosecution case. The doubt could have been resolved if the prosecution had called Yee Chin Koon as a witness or, alternatively, in the absence of him being traced, by tendering in evidence the police statement that he had made. As the defence of the accused was suggested to the witnesses for the prosecution in the course of its case it ought to have adduced the evidence of Yee Chin Koon to rebut the suggestions at that stage. I pause to add that even if the prosecution had applied to tender the evidence of Yee Chin Koon in rebuttal it would not have succeeded as such evidence was in its possession and its materiality had been known from the very beginning. As proof of guilt can be established only on the whole of the evidence adduced it now emerges that Yee Chin Koon's evidence is material which the prosecution ought to have adduced. This raises the presumption under s 114(g) that if such evidence had been adduced it would have been unfavourable to the prosecution. I am therefore not satisfied that the prosecution had proved its case against the accused beyond reasonable doubt. Accordingly I acquit and discharge him.

Accused acquitted and discharged.

Reported by Jafisah Jaafar